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Supreme Court of New York, New York County: People v. Crespo

Bradley Shelowitz
bradley-shelowitz@tourolaw.edu

SUPREME COURT OF NEW YORK
NEW YORK COUNTY

People v. Crespo[1]
(decided September 22, 2010)

Detective Larry Maraj handcuffed defendant Jose Crespo believing him to be in possession of drugs.[2] Defendant Crespo revealed nine Ziploc bags of crack cocaine from his rectal area after Maraj told him that if he failed to cooperate, Maraj would charge him with a separate felony for every bag he would personally uncover.[3] The primary focus of this Article is the defendant's purported waiver of his Fourth Amendment and New York State constitutional rights in his act of "voluntarily" producing the drugs from his body.[4] The defense argued that Crespo removed the drugs in response to a coercive interrogation, and thus involuntarily waived[5] his rights under the Fourth Amendment to the Federal Constitution and article I, section 12 of the New York Constitution.[6] The court granted defendant's motion to suppress the drugs, holding that the

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[1] People v. Crespo, No. 10-1812, slip op., at 1 (N.Y. Sup. Ct. 2010).

[2] *Id.* at 2.

[3] *Id.*

[4] *Id.* at 6 (the court did not need to decide on the constitutionality of the search given that the evidence was already held to be suppressed for being a *Miranda* violation. This however does not make addressing the constitutional issues in every case superfluous, for there are cases where consent to a search is given by a defendant prior to any need for a *Miranda* warning, e.g., when a suspect is not yet under arrest or in police custody).

[5] *See id.* at 3. "[B]y allowing the police to conduct a search, a person "waives" whatever right he had to prevent the police from searching." Schneckloth v. Bustamonte, 412 U.S. 218, 235 (1973).

[6] The Fourth Amendment to the United States Constitution states, in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, section 12 of the New York Constitution states identical language to the relevant United States Constitution amendment.

defendant's production of the drugs from his private area was the result of official coercion, and therefore not a voluntary waiver of his Fourth Amendment rights.[7]

On April 18, 2010, Detective Larry Maraj, an experienced police officer with over 200 drug-related arrests and specialized training in street narcotics enforcement, received a radio transmission that informed him of a narcotics sale that was to take place and a description of the suspects involved.[8] Maraj observed two men walking on the street corner of 129th Street and Madison Avenue, who fit the descriptions he heard over the radio.[9] The two suspects greeted each other by shaking hands and briefly spoke.[10] Maraj then observed one of the men, later learned to be Wallace McCollough, give the defendant Crespo currency, followed by Crespo's placement of a small unidentifiable object in McCollough's hand.[11] Based upon his experience, Maraj had a strong belief that a drug sale just took place, and proceeded to arrest Crespo.[12] The events that ensued, following the handcuffing of Crespo, are the basis of the legal dispute.

Once Crespo was handcuffed, he was officially considered to be in police custody.[13] After Maraj handcuffed the defendant and frisked him for weapons, he notified the defendant that he was being arrested for a "narcotics sale," but failed to read Crespo his *Miranda* rights.[14] Crespo subsequently responded: " 'Search me, I don't have anything,' " but Maraj did not conduct a search for drug paraphernalia at this time, or at any point.[15] Instead, Maraj, acting on his police instincts honed after ten years of experience, told Crespo

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[7] Crespo, No. 10-1812 slip op., at 7.

[8] *See id.* at 1-2.

[9] *Id.* at 2.

[10] *Id.*

[11] *Id.*

[12] *Crespo*, No. 10-1812 slip op., at 3-4 ("[P]robable cause exists when a police officer has knowledge of facts and circumstances sufficient to support a reasonable belief that an offense has been or is being committed." (citing People v. Bigelow, 488 N.E.2d 451, 455 (N.Y. 1985))). It is odd that defense counsel did not argue a lack of probable cause for making the arrest. According to the court's finding, any person who finds themselves in an area notorious for drug dealing may be handcuffed and searched for the simple act of giving a friend a small unidentifiable object in the street. *Crespo*, No. 10-1812 slip op., at 4.

[13] *Id.*

[14] *Id.* at 2-3.

[15] *Id.* at 2.

he believed that Crespo had drugs concealed in his rectal area.[16] Crespo again denied that he had any drugs in his possession.[17] Maraj told Crespo that if he did not cooperate and reveal the drugs, Maraj would "look up there" himself.[18] Maraj also told Crespo that if he failed to cooperate, he would charge the defendant with a separate felony for every bag uncovered.[19] Crespo then reached into his back pants and revealed nine Ziploc bags of crack cocaine.[20]

After the court found that suppression of the evidence was required because of a *Miranda* violation and the consent being a product of "traditional involuntariness" in violation of section 60.45(2)(a)(ii) of the New York Criminal Procedure Law,[21] it found that the defendant's *production of the drugs* was a consequence of "official coercion, a yielding to overbearing official pressure, and not a voluntary" relinquishment of his right to privacy under the Fourth Amendment.[22] *Crespo* did not explain why the defendant's own production of drugs from his private area implicated the Fourth Amendment, the right to be free from unreasonable searches and

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[16] *Id.*

[17] Crespo, No. 10-1812 slip op., at 2.

[18] *Id.*

[19] *Id.*

[20] *Id. See also id.* at 10 (noting that the defendant, not the officer, removed the drugs, therefore, "the exact location where the bag of drugs was concealed was never ascertained; that is, whether it was within an area above the defendant's rectum, or whether it was partially or fully within a body cavity").

[21] Section 60.45(2)(a)(ii) of the New York Criminal Procedure Law states, in pertinent part:

> 2. A confession, admission or other statement is "involuntarily made" by a defendant when it is obtained from him: (a) By any person by the use or threatened use of physical force upon the defendant or another person, or by means of any other improper conduct or undue pressure which impaired the defendant's physical or mental condition to the extent of undermining his ability to make a choice whether or not to make a statement . . . .

The *Crespo* opinion, written by Hon. Juan M. Merchan, discussed how the statement did not amount to consent to a search. *Crespo*, No. 10-1812, slip op. at 6. However, if Crespo's statement did constitute a valid consent, the conduct of the detective went beyond the scope of the consent. *Id.* (stating that "even when a consent to search is obtained, the scope of such consent must be strictly construed"). The court reasoned that the statement was merely a consent to search of the defendant's "outer clothing, and not a consent to a strip search or a body cavity search," mainly because the officer had not yet conducted a search incident to arrest. *Id.* Judge Merchan held that the statement failed to meet the high standard necessary to qualify as consent to a strip or body cavity search. *Id.* at 6, 8.

[22] *Id.* at 7 (citing People v. Gonzalez, 347 N.E.2d 575, 580 (N.Y. 1976)).

seizures, where the officer did not conduct the search himself.[23] Furthermore, the government was prohibited from using the inevitable discovery doctrine, which sometimes allows the introduction of evidence illegally obtained.[24]

The crux of the issue is whether the defendant's waiver of his Federal and New York Constitutional rights in revealing the narcotics from a private area of his body was a "free and unconstrained choice."[25] The *Crespo* court correctly applied federal and New York case law in finding that the defendant's waiver of his Fourth Amendment and New York constitutional rights was a product of official police coercion.[26] The court was also right in taking into account the totality of the circumstances surrounding the arrest in coming to its conclusion that the waiver of the defendant's constitutional rights was involuntary.[27] The court missed the mark in holding that the defendant was never searched.[28] The court made an unjustified expansion of the Fourth Amendment's reach by applying it to searches conducted not by the officer who applied the coercion, but by the individual who experienced the coercion.

The Supreme Court decision *Schneckloth v. Bustamonte*[29] was heavily relied upon by the *Crespo* court in coming to its holding. It is well settled that a warrantless search is " '*per se* unreasonable' " absent " 'a few specifically established and well-delineated exceptions.' "[30] One of the " 'well-delineated exceptions' " to a

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[23] This vital issue will be discussed later in the Article.

[24] In the court's final analysis it discusses whether the inevitable discovery doctrine applied to the evidence, precluding suppression: "The test for inevitable discovery is whether it has been demonstrated, by a very high degree of probability, that the evidence sought to be suppressed would inevitably have been discovered, irrespective of the initial wrong." *Crespo*, No. 10-1812, slip op., at 7. The court found that the inevitable discovery doctrine can only revive suppressed evidence if the evidence is secondary, meaning it was not obtained as a direct consequence of the improper police conduct. *Id.* The evidence at issue did not meet those criteria. *Id.* at 8. Further, the court found that even if the evidence could be classified as secondary, it would not have inevitably been discovered because the officer, in order to discover the drugs, would have had to conduct a strip search, which would not have been proper because the officer did not have any *factual* basis to support his suspicion that drugs were being concealed in the defendant's rectal area, which is required to warrant a strip search. *Id.* at 8.

[25] *Id.* at 6 (citing *Gonzalez*, 347 N.E.2d 575).

[26] *Crespo*, No. 10-1812, slip op., at 7.

[27] *Id.*

[28] *Id.* at 10.

[29] 412 U.S. 218.

[30] *Id.* at 219 (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).

warrantless search is a search conducted pursuant to consent.[31] In *Bustamonte*, the Court defined the term "consent" in the context of the Fourth and Fourteenth Amendments.[32]

In *Bustamonte*, the defendant loaned his vehicle to his brother and five friends who were pulled over by the police for a burned-out headlight.[33] None of the occupants of the car were ever under arrest or could be deemed to be in police custody at any point.[34] After two other officers arrived at the scene, one of the officers asked the vehicle owner's brother if the officers could search the vehicle, to which he responded: " 'Sure, go ahead.' "[35] The atmosphere of the incident was characterized as " 'congenial,' " without any hint of a threat of arrest;[36] the vehicle owner's brother even aided in the search by opening the trunk and the glove compartment.[37] One of the officers discovered three stolen checks hidden beneath the rear car seat.[38] The defendant was arrested and charged with possessing a check with intent to defraud, in violation of California Penal Code section 475(a).[39] The defendant claimed that his brother did not "consent" to the search because he was unaware at the time of his right to refuse consent to a search.[40] The Court of Appeals for the Ninth Circuit agreed with this contention and held that the State had the burden of proving that the person giving consent knew of his right to refuse consent to a search in order to stay within the bounds of the Constitution.[41]

The Supreme Court reversed, noting first in its discussion the competing interests of promoting effective police investigations and

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[31] *Id.* at 219.

[32] *Id.*

[33] *Id.* at 220.

[34] *Bustamonte*, 412 U.S. at 220.

[35] *Id.* (noting that although the defendant wasn't present to offer his consent to a search, the defendant assumed this risk in allowing his brother to use his vehicle).

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] CAL. PENAL CODE § 475(a) (Deering 2010).

[40] *Bustamonte*, 412 U.S. at 221-22.

[41] *Id.* at 223 (the California State courts follow the rule that this "knowing" factor is just one of many that should be considered in looking at the totality of the circumstances in determining whether a person voluntarily waived his Constitutional rights in consenting to a search).

the right a citizen has in being free from unreasonable searches.[42] The Court stated that police need to be given considerable leeway in conducting searches, but on the opposite end of the spectrum "is the set of values reflecting society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness."[43] It was these two counterbalancing principles that formed the basis of the Court's holding.[44] Recognizing the importance of permitting one to consent to a search, the Court held that:

> [T]he *Fourth* and *Fourteenth Amendments*[45] require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For no matter how subtly the coercion was applied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.[46]

The Court rejected the Ninth Circuit's subjective test of requiring the prosecution to prove that the defendant knew he had a right to refuse consent in order to satisfy the Fourth Amendment.[47] The *Bustamante* Court did not want to follow "any such litmus-paper test of voluntariness" because it would enable a defendant to simply deny having the requisite knowledge of his right to refuse consent, thereby making inadmissible any evidence tainted by an otherwise reasonable search.[48]

The Court differentiated between a waiver of certain rights made during a criminal court proceeding, and a Fourth Amendment waiver. It was noted, that in order for a defendant to validly "waive" his constitutional rights in the context of the safeguards of a fair criminal trial, a defendant must knowingly and intelligently relinquish a known right or privilege.[49] However, the Court did not

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[42] *Id.* at 224-25.

[43] *Id.* at 225.

[44] *See id.* at 227.

[45] The Court did not discuss the *Fifth Amendment*, presumably, because the defendant was not present during the search, therefore it was his brother who incriminated the defendant and not the defendant himself. *Bustamonte*, 412 U.S. at 221-22.

[46] *Id.* at 228.

[47] *Id.* at 229.

[48] *Id.* at 230.

[49] *See id.* at 235.

find it necessary to follow this "knowing and intelligent" waiver test in the context of the right to privacy, finding that it only applied in cases concerning rights intended to ensure that a defendant receives a fair trial such as the right to a speedy trial, the right to a jury trial, and the right to confrontation.[50] It believed that the Fourth Amendment stands to preserve "values reflecting the concern for our society for the right of each individual to be let alone."[51] The Court seemed to believe that these values are not as dangerously susceptible to involuntary waiver as those "basic protections that the Framers thought indispensable to a fair trial."[52] The *Bustamonte* Court reasoned that it is not a part of the policy of the Fourth Amendment to discourage officers from obtaining a consent to search, because such consent could aid in a police investigation by narrowing the suspect list down, which benefits society as a whole.[53] Unlike Fourth Amendment waivers, "every reasonable presumption ought to be indulged against voluntary relinquishment" of constitutional rights designed to further the fundamental principle of a fair trial.[54]

The Court also drew this distinction between a coercion-induced consent to search, and the coercion-induced consent to a relinquishment of rights meant to promote a fair trial, for pragmatic purposes: "It would be unrealistic to expect that in the informal, unstructured context of a consent-based search, a policeman, upon pain of tainting evidence obtained, could make the detailed type of examination demanded" by the strict "voluntary and intelligent" test, as is conducted during trial to determine if a defendant, who has waived his right to counsel, has done so voluntarily.[55] It also pointed out that the consequences can be far more severe for waiving one's rights associated with a trial, such as the right to plead not guilty, compared to waiving one's Fourth Amendment right to privacy.[56]

Bustamonte made clear that its holding was limited to cases where "the subject of a search is not in custody," and where the State attempts to justify the search on the basis of the defendant's

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[50] *Bustamonte*, 412 U.S. at 237-38.
[51] *Id.* at 242.
[52] *Id.*
[53] *See id.* at 243.
[54] *See id.*
[55] *Bustamonte*, 412 U.S. at 245.
[56] *Id.* at 246.

consent.[57] The Court held that in such a case, the Fourth and Fourteenth Amendments require the State to prove the consent was voluntarily given and not a result of coercion or duress, either express or implied.[58] Voluntariness is a question of fact that must be determined from a totality of the circumstances, with the defendant's actual knowledge of his right to refuse consent being only one factor that *may* be considered in establishing if consent was voluntarily given.[59] Any relevant factors, the Court stated, could be considered in determining whether consent was voluntarily given including, but not limited to, "evidence of minimal schooling, low intelligence, and the lack of any effective warnings to a person of his rights."[60]

It is not clear whether the Court's decision would have varied if the defendant, as in *Crespo*, was in police custody at the time that the "consent" was given, and the search was of the person rather than the person's vehicle. It is also unclear how *Bustamonte* applies to cases in which the consenting party involuntarily reveals the contraband, instead of the police finding the contraband during a physical search, and whether the Court would hold that this implicates the Fourth Amendment at all.

The Supreme Court decision in *Schmerber v. California*[61] sheds some light on the issue of Fourth Amendment violations in the context of an *involuntary* search of a person's body.[62] Although *Schmerber* does not concern the issue of consent, it explains how the Fourth Amendment applies in searches involving some form of penetration of the person's body, which is what occurred in *Crespo*.

In *Schmerber*, the defendant was arrested for driving while under the influence of alcohol.[63] The defendant drove into a tree and suffered injuries that required medical attention.[64] The arresting officer read the defendant his *Miranda* warnings at the hospital and informed him that a blood alcohol test would be administered to determine his blood alcohol content.[65] Taking the advice of counsel,

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[57] *Id.* at 248.
[58] *Id.*
[59] *Id.* at 227-31.
[60] *Bustamonte*, 412 U.S. at 248.
[61] 348 U.S. 757 (1966).
[62] *Id.*
[63] *Id.* at 758.
[64] *Id.* at 759.
[65] *Id* at 758-59.

the defendant refused to consent to the blood test, but a physician, at the direction of the police officer, commenced the minimally invasive test anyway.[66]

The *Schmerber* Court held that the defendant's Fourth Amendment rights were not violated.[67] The Court prefaced its discussion of the Fourth Amendment issue by stating that the "overriding function of the *Fourth Amendment* is to protect personal privacy and dignity against unwarranted intrusion by the State."[68] With this philosophy as a back drop, the Court concluded that the *forced* administration of a blood test is undoubtedly a "search and seizure" contemplated by the Fourth Amendment.[69]

The blood test was found to implicate the Fourth Amendment, but this was not conclusive of the Court's inquiry because the Court believed that the Fourth Amendment was not designed to protect against all intrusions, but only those that are unjustified under the circumstances, or employed in an improper manner.[70] The Court, therefore, decided whether "the police were justified in requiring petitioner to submit to a blood test, and whether the means and procedures employed in taking his blood test respected relevant Fourth Amendment standards of reasonableness."[71]

The *Schmerber* Court held that the officer was justified in demanding a blood test, and that the blood test was conducted in a reasonable fashion.[72] The Court mentioned the great importance of having a detached and neutral judge or magistrate determine whether an invasion of another person's body is warranted, rather than a police officer who has the driving motive, not to promote justice and fairness, but to put criminals behind bars.[73] The Court found that the warrant requirement could only be obviated under circumstances

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[66] *Schmerber*, 348 U.S. at 759 (blood alcohol tests "are a commonplace in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain").

[67] *Id.* at 772.

[68] *Id.* at 767.

[69] *Id.* (stating that "[s]uch testing procedures plainly constitute searches of "persons," and depend antecedently upon seizures of "persons," within the meaning of [the] [Fourteenth] Amendment").

[70] *See id.* at 768.

[71] *Schmerber*, 348 U.S. at 768.

[72] *Id.* at 771.

[73] *See id.* at 770.

where the officer "might reasonably have believed that he was confronted with an emergency, in which delay necessary to obtain a warrant . . . threatened 'the destruction of evidence.' "[74] In applying this standard to the specific facts, the Court found that such an "emergency" existed because of the scientific fact that blood alcohol content diminishes with time;[75] the amount of time wasted in obtaining a warrant would have allowed the alcohol to dissipate from the defendant's blood stream, therefore resulting in a " 'destruction of evidence.' "[76] On this basis alone, the Court found that the officer was justified in demanding a blood test.[77]

The decision in *Schmerber* is distinguishable from *Crespo* considering the significant differences in the facts of both cases. With respect to the Fourth Amendment claim, in *Crespo*, unlike *Schmerber*, consent was at issue, and the defendant, not the police or some other third party, performed the body surface intrusion himself.[78] There is nothing in the *Schmerber* decision that could provide any guidance on the elusive issue of whether a person can violate his or her own Fourth Amendment rights at the behest of the State. *Schmerber* does dictate whether it would have been proper for the *officer* to conduct the body cavity search. Specifically, finding the search to be justified and reasonable, despite the absence of a warrant, rested on the fact that the evidence would have been destroyed without an immediate search.[79] Such destruction was not possible in *Crespo* because the defendant was handcuffed, and therefore, he was prevented from removing the drugs from his rectal area.[80] Additionally, there was no temporal constraint, as was present in *Schmerber*, which could have justified an immediate warrantless search. Therefore, under *Schmerber*, the officer—had he conducted the cavity search—would have violated Crespo's Fourth Amendment rights.

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[74] *Id.* (citing Preston v. United States, 376 U.S. 364, 367 (1964)).

[75] *Id.* at 770. The officer had reason to believe the defendant was intoxicated based on a few telling signs: the officer smelled liquor on defendant's breath; defendant's eyes were bloodshot; and the defendants' getting into a one car accident. *Schmerber*, 348 U.S. at 768.

[76] *Id.* at 770-71 (concluding that the test was administered in a reasonable fashion given that it was conducted in a hospital according to accepted medical practices).

[77] *Id.* at 771.

[78] In *Schmerber*, the defendant clearly objected to the blood test. *See id.* at 759.

[79] *See id.* at 770.

[80] *See Crespo*, No. 10-1812, slip op., at 6.

An illuminating New York Court of Appeals case used by the *Crespo* court in reaching its decision, *People v. Gonzalez*,[81] concerned the defendants' written consent to a search of their apartment.[82] In *Gonzalez*, the court found that the defendants' consent, although in writing, was not a free and unconstrained choice, but a product of official police coercion and pressure, and therefore, in violation of their rights under the New York State and Federal Constitutions.[83]

In *Gonzalez*, Drug Enforcement Agent Michael Horn was sold a " 'sample' " of cocaine by Gonzalez in the bedroom of his small apartment in New York City.[84] Horn, acting undercover as a drug buyer, observed that Gonzalez was becoming suspicious of him after making the initial sale, so he left and came back to the apartment with another federal agent to make the arrest.[85] With the prospect of arrest, the defendant struggled with Horn, but was eventually subdued after falling down a flight of stairs.[86] Moreover, as the arrest was taking place, the defendant screamed to his newly wedded wife to " 'lock the door.' "[87] It is also important that both Gonzalez and his wife were under the age of twenty.[88] The agents began banging and kicking at the door of the apartment, and finally, after an aggregate of nine federal agents were at the door, Mrs. Gonzalez opened the door.[89] She was handcuffed, and both she and her husband were read their *Miranda* warnings.[90] A few minutes later Mrs. Gonzalez's grandfather and mother came in, but after five minutes they were forced to leave.[91] The defense claimed that the agents then threatened Mr. Gonzalez with prosecution under severe state laws, rather than the more lenient federal laws, and that the newlyweds would be separated forever.[92] The agents presented Mr.

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[81] 347 N.E.2d 575 (N.Y. 1976).
[82] *Id.* at 577.
[83] *See id.*
[84] *Id.*
[85] *See id.* 578.
[86] *Gonzalez*, 347 N.E.2d at 578.
[87] *Id.*
[88] *Id.* at 577.
[89] *Id.* at 578.
[90] *See id.*
[91] *Gonzalez*, 347 N.E.2d at 578.
[92] *See id.*

Gonzalez with a consent form and asked him if he would " 'waive his rights,' " to which he responded in the affirmative.[93] Mr. Gonzalez signed the form and Mrs. Gonzalez signed one as well.[94] The defendants claimed that at the time they consented to the search, they were not sure whether Mrs. Gonzalez had flushed all of the drugs down the toilet or if some remained in the apartment.[95] The federal agents then conducted a full-blown "rummage search" of the apartment and uncovered a commercial quantity of drugs.[96] The court had to decide the issue of whether the written consents were voluntarily given, and thus, constitutionally permissible.[97]

Citing to the New York and Federal Constitutions, the *Gonzalez* court stated that "[g]overnmental intrusion into the privacy of the home is, with limited exceptions, prohibited by constitutional limitations in the absence of a valid search warrant."[98] It noted that the People have the "heavy burden of proving the voluntariness of the purported consents."[99] Voluntary consent was defined to be "a true act of the will, an unequivocal product of an essentially free and unconstrained choice."[100] The court applied the test enumerated in *Bustamonte* to determine if the consent was voluntary, which entails an evaluation of the circumstances taken as a whole.[101]

The court found that a very important, but not dispositive factor, in determining the voluntariness of consent to a search, is evaluating whether the individual was under arrest or in custody when he authorized his consent.[102] The court considered all of the circumstances surrounding the arrest in determining consent, including the age and experience of the defendant.[103] The court compiled a number of circumstances that in the collective were found to have overcome the will of the defendant: the timing of the consent, specifically whether it was given immediately following an arrest; the

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93 *Id.* at 579.
94 *Id.*
95 *Id.*
96 *Gonzalez*, 347 N.E.2d at 579. A "rummage search" is *not* a technical legal term.
97 *Id.*
98 *Id.*
99 *Id.* at 580.
100 *Id.*
101 *Gonzalez*, 347 N.E.2d at 580.
102 *Id.* at 580.
103 *Id.* at 581.

resistance to arrest; the number of police agents present; the handcuffing of the defendant, if at all; the defendant's experience with police; the age of the defendant; the evasiveness of the consenter prior to offering the consent; the assistance of the defendant in the search; and the advisement of the defendant's right to refuse consent.[104] The court noted that none of these factors are meant to be determinative of the issue of voluntary consent.[105]

The court, in applying these factors to the specific facts of the case, found that the defendants' consent was not given voluntarily, but was, as a matter of law, a product of unjustified police pressure.[106] The defendants, being under twenty years of age, were particularly susceptible to police coercion, which affected their ability to make a "free and unconstrained choice."[107] Additionally, the infiltration of nine armed federal agents into a tiny apartment, preceded by a violent physical resistance to arrest, was not at all conducive to a voluntary consent.[108]

After concluding that the written consent could not have possibly been voluntary, the court stated that "the facts in cases involving constitutional limitations [should] not be clinically dissected with the body fluids drained and the network of nerves dead."[109] This statement reveals the court's guiding philosophy that drives its decisions in consent to search cases, which is to place itself in the perspective of the consenter.[110] Instead of applying a mechanistic and formal approach, the court looks at the circumstances as a whole with a hint of compassion and realism in making its determination.[111]

Another finding by the court that influenced its holding was that the federal agents could have easily obtained a warrant instead of exerting unjustified pressure on the defendant to consent to an immediate search.[112] The court admonished the officers' conduct in stating it "was offensive official conduct more suitable to a police

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104 *Id.* at 580-81.
105 *Id.* at 580.
106 *Gonzalez*, 347 N.E.2d at 582.
107 *Id.* at 581.
108 *Id.* at 581-582.
109 *Id.* at 582.
110 *Id.*
111 *See Gonzalez*, 347 N.E.2d at 582.
112 *Id.*

society than to a policed society."[113]

The final holding of the court demonstrates that there may be a slight difference in how the federal courts treat consent-based search cases than the state courts. The court stated that "the seizure would have hardly survived scrutiny . . . in the Federal courts," but "may not survive scrutiny in [] State courts."[114] The court described that "[a] bad seizure under the Federal Constitution in the Federal courts is also a bad seizure under both the Federal and State Constitutions in the courts of [New York]."[115]

The *Crespo* court also relied on another New York Court of Appeals case, *People v. Whitehurst*,[116] in reaching its decision. *Whitehurst* dealt with the issue of whether the prosecutor or the defendant has the burden of proving voluntary consent to a search.[117] The court held that in a consent-based search, the burden is on the People to establish that the defendant, by consenting to a search, voluntarily waived his or her constitutional rights.[118]

In *Whitehurst*, the defendant was approached by an officer whom he knew from a previous narcotics arrest.[119] Upon seeing the officer, the defendant stated, " 'Oh no. Not you again,' " to which the detective replied, " 'Yes, it's me. What have you got this time?' "[120] Immediately after the detective said this, the defendant revealed from his pockets two glassine envelopes of drugs, put them on the counter in front of the detective and said, " 'That's all I've got.' "[121] The defendant was charged with, and plead guilty to, unlawful possession of narcotics, and was sentenced to six months in jail.[122]

The majority of the court found that the interrogative nature of the officer's question, " 'What have you got this time?,' " was similar to asking for the defendant's consent to a search.[123] The

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113 *Id.*
114 *Id.*
115 *Id.*
116 254 N.E.2d 905 (N.Y. 1969).
117 *See id.* at 906.
118 *Id.*
119 *Id.* at 905.
120 *Id.*
121 *Whitehurst*, 254 N.E.2d at 905-06.
122 *Id.* at 905.
123 *Id.* at 906.

court held that because of the inquisitorial nature of the statement, the defendant's ultimate production of the drugs in response to this question was a waiver of his constitutional rights, thereby placing the burden on the People to prove this waiver was voluntary.[124] The People, along with the dissenting opinion, argued that a search never actually occurred, and therefore, consent to a search was not an issue, obviating the need for the People to prove the defendant made a voluntary waiver of his constitutional rights.[125] Judge Scileppi, in dissent, logically argued that the officer never conducted a search of the defendant because "the defendant had of his own volition, turned the contraband over to [the detective]."[126] Although the dissent admits that a search, in order to be considered a search within the meaning of the Constitution, does not require a "*physical* examination of a person or his property," it held that "unsolicited relinquishment of possession of contraband" cannot reasonably be a search within the meaning of the Constitution.[127]

The federal court cases cited by *Crespo* seem to provide scant guidance on how the Fourth Amendment applies to cases in which the defendant is coerced into consenting to a search involving penetration of the person's body. A critical difference between the facts in *Bustamonte* and *Crespo*, is that in *Bustamonte*, the Supreme Court considered the consent exception to a search of a *vehicle*, whereas in *Crespo* the defendant's *body* was the subject of the search.[128] A search of a person's body is the most personal and intrusive invasions of one's privacy rights conceivable, which should be legally permissible in only the rarest instances—when a defendant is not only completely aware of his right to refuse, but also free and clear from any hint of coercive bargaining.

No state or federal cases cited in *Crespo* provide any guidance on the issue of whether, as in *Crespo*, the Fourth Amendment applies when a defendant is coerced into searching his own person. Looking at the text of the Fourth Amendment and the policies behind its inception, it does not seem likely that the Fourth Amendment is implicated under these circumstances, because no search has

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[124] *See id.*

[125] *See id.* at 906.

[126] *Whitehurst*, 254 N.E.2d at 907 (Scileppi J., dissenting).

[127] *Id.* at 907 (Scileppi J., dissenting) (emphasis added).

[128] *Compare Bustamonte*, 412 U.S. at 219-20, *with Crespo*, No. 10-1812, slip op., at 2.

occurred.

The *Crespo* court, in holding that the defendant's Fourth Amendment rights were violated when he was coerced into the search of himself, does not further the purposes of the Fourth Amendment, but only serves to dilute it. An innocent person without drugs on his or her person, experiencing detective Maraj's verbal inducement to perform a self-search, would not perceive the officer's conduct as coercive, because he or she would not have anything to be coerced into searching for. To the innocent, threats by an officer to be charged for every bag of crack uncovered would mean nothing. The only possible situation in which the tactics employed by the officer in *Crespo* could be deemed "coercive" is if the suspect actually had the drugs.

The point of the Fourth Amendment is not to protect the guilty from committing a search of *themselves*, but to protect the innocent from unjustified intrusions of privacy. The *Crespo* court, in holding that the defendant's Fourth Amendment rights were violated, is saying that a person can commit an unreasonable search of themselves. The defendant was not forced to violate himself through the police coercion—the defendant was simply asked to retrieve drugs from his rectal area *if* he had any, and if he did not, then there would not be anything to search for.

It is difficult to conceive of a situation in which a police officer could commit an unreasonable search and seizure of a person where that person searches himself. Only the most extreme example fathomable could possibly amount to an unreasonable search by oneself within the meaning of the Fourth Amendment. This is where an officer forces by coercion an *innocent* person to reach into himself to prove to the officer the nonexistence of drugs. So it is only this possibility of an innocent person being coerced to search one's private area that the courts should fear if they were to state a general rule that under no circumstances could a person's Fourth Amendment rights be violated by being coerced into searching themselves. This unintended outcome of setting such a general rule is highly unlikely to occur, and if it does occur by the third hand of some rogue police officer, it will surely be covered by the Fourth Amendment.

Maraj did not request an innocent person to prove to him the nonexistence of drugs—he did not demand the defendant to search in his rear area—he only demanded that he *reveal the drugs* that he

believed to be present there.[129] If the defendant did not have any such drugs then he would not have searched himself, as he would have known that there was nothing to search for. An innocent person would not have bothered reaching into his rectal area, because nothing would have been there.

In stating that the officer's conduct was not an invasion of the defendant's privacy, it should not be assumed that such conduct was proper or lawful on all grounds. The police action in question and others resembling it "invoke societal disapproval . . . and offend our notions of fundamental fairness."[130] Put simply, even criminals deserve to be treated with civility. Such police coercion should not be permitted to go unchecked, but the Fourth Amendment should not be drafted into service for such purposes.

Assuming that the *Crespo* court was correct in finding that the defendant's production of the drugs from his private area was a "search" within the meaning of the Fourth Amendment, looking at the totality of the circumstances surrounding this "search," it must be determined whether the consent to said search was voluntary. The standard for determining if consenting to a waiver of one's constitutional rights is not whether the defendant would have waived his rights absent any police action, but whether the defendant made a "free and unconstrained choice."[131]

The defendant in *Crespo* was handcuffed and under police custody, which are both very important factors in considering voluntariness.[132] When a person is under police custody it is reasonable to assume the person is frightened and less able to use his or her faculties in order to respond freely and intelligently to police questioning. Crespo's age is unknown, and so is whether Crespo had any prior experience with the police, which are both relevant in determining whether he freely waived his rights. As stated in *Gonzalez*, the test is subjective, requiring a look into what the defendant was most likely experiencing and feeling during the time he waived his rights.[133] Every detail of the events leading up to the arrest, including the act of arresting the defendant, should be known

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[129] *Crespo*, No. 10-1812, slip op., at 2.

[130] People v. Anderson, 364 N.E.2d 1318, 1319-20 (N.Y. 1977).

[131] *Gonzalez*, 247 N.E.2d at 580.

[132] *Crespo*, No. 10-1812, slip op., at 4.

[133] *See id.* at 582.

in order to make an accurate determination of whether there was voluntary consent. If the defendant had been aggressively arrested, or treated in some way that can be viewed as an unusual departure from an ordinary arrest, this would surely contribute to his inability to voluntarily consent. The size and overall appearance of the arresting officer, and as insignificant as it may seem, the depth and commanding style of his voice, may also be relevant. The court in making its determination seemed to focus solely on the comments made by Detective Maraj to Crespo.

Being threatened by a detective while one is handcuffed, and being told that the detective is going to reach into one's private area for drugs, will most likely make anyone consent to almost anything to avoid this humiliating and debasing act. Maraj's deplorable and coercive conduct far exceeded what is required to prove a lack of voluntary consent.

Bradley Shelowitz[*]

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